No. 82-1098

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ISIDORO RODRIGUEZ,

Appellant,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES (DOES),

Appellee.

On Appeal From The
District Of Columbia Court Of Appeals

MOTION OF APPELLEE TO DISMISS OR TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the Supreme Court has jurisdiction under 28 U.S.C. Section 1257(1) to hear an appeal from a judgment of the District of Columbia Court of Appeals which affirmed a final decision of the Acting Director of the District of Columbia Department of Employment Services (DOES) ordering that Appellant be disqualified from receiving unemployment compensation benefits on the ground that Appellant committed fraud in representing his employment status to DOES?

2. Whether a writ of certiorari should be granted under 28 U.S.C. Section 1257(3) to review such decision?

3. Whether the District of Columbia Court of Appeals erred in its final judgment?

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**The opinion below is attached as an Appendix.

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MOTION TO DISMISS OR TO AFFIRM

SUMMARY OF ARGUMENT

Appellee, through Counsel, hereby Moves the Honorable Court to Dismiss this Appeal or to Affirm the Judgment below; and as cause states as follows:

I. This appeal must be dismissed for lack of jurisdiction;

II. No writ of certiorari should be granted; and

III. The final judgment of the Court below was correct and should be affirmed.

Appellee's position is further developed in the following Brief in Support of Appellee's Motion to Dismiss or to Affirm.

COUNTERSTATEMENT OF THE FACTS

Appellant has appealed from an order of the District of Columbia Court of Appeals which affirmed an administrative ruling made by the Acting Director of the District of Columbia Department of Employment Services (DOES) that he would be disqualified from receiving unemployment insurance benefits because of fraud.[1/] The facts relevant to the final administrative action follow.

1/ The applicable law provides:

> Any person who the Board finds has made a false statement or representation, knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this act may be disqualified for benefits for

On January 7, 1980, Appellant Isidoro Rodriguez (hereinafter the "claimant") filed a claim for unemployment benefits with DOES. He claimed benefits based on his previous employment from April through December, 1979 with the D.C. Office of Personnel (hereinafter the "employer").

On January 23, 1980, an initial determination was made finding claimant eligible for benefits of $181.00 per

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1/ continued from preceding page

> all or part of the remainder of such benefit year and for a period of not more than one year commencing with the end of such benefit year.... Section 19(e) of the District of Columbia Unemployment Compensation Act, 49 Stat. 956; D.C. Code 1981, sec. 46-120(e)(1).

week. Thereafter, claimant received benefits for weeks ending January 19 through March 22, 1980.

For each week for which benefits were paid, claimant certified that he was not employed and had no earnings payable.[2/]

2/ The form contains a section headed "Claimant's Certification of Eligibility for Benefit Payments" and contains, inter alia, the following statement:

> I register for work and claim waiting week credit or unemployment benefits in accordance with the provisions of the District of Columbia Unemployment Compensation Act for each calendar week for which I sign below, and certify with respect to such week, that ...during each such week...I was not engaged in full time employment and that my total earnings from all sources were as reported for each week for which I sign.***I am aware that the law imposes penalties for making any false statements in connection with this claim. (Emphasis in original. See Tab X-3 of the administrative record filed with the Court below.)

While continuing to collect unemployment benefits, claimant began to perform services on February 4, 1980 as an Expert Consultant at the rate of $157.00 per day. This work was performed pursuant to an agreement with the Chairperson of the D.C. Office of Employee Appeals (OEA). These arrangements were evidenced by several documents: a notarized appointment affidavit signed and dated by the claimant showing (in claimant's handwriting) an entry on duty date of February 4, 1980; a letter to "confirm the arrangements agreed to by telephone" from the Chairperson of OEA to the City Administrator dated February 7, 1980; a letter of acknowledgement from the City Administrator to the Chairperson of OEA dated February 8, 1980; and a D.C. Government Personnel Action (Form 1),

approved February 20, 1980, showing an effective date of February 4, 1980.

According to claimant, he actually received earnings for the services performed for OEA on or about March 18. Claimant did not disclose the fact of his employment or his receipt of earnings to DOES.

On April 1, 1980, correspondence was addressed from the employer to DOES requesting a review of claimant's continuing eligibility for benefits and seeking the imposition of a disqualification for fraud pursuant to Section 19(e) of the District of Columbia Unemployment Compensation Act; D.C. Code 1981, sec. 46-120(e) (hereinafter the "Unemployment Compensation Act").[3/]

3/ See footnote 1 above at pages 2-3 which quotes the applicable law.

On April 3, 1980, a DOES Claims Examiner determined that claimant was overpaid $1,267 because he was not unemployed as of February 4, 1980.[4/] According to claimant, this document was hand delivered to claimant on April 4, 1980 when claimant met with the then Director of the DOES Office of Unemployment Compensation. At the same time "in order to foreclose the appearance of impropiaty (sic)" claimant repaid $1,000 and delivered a letter from himself to the then Director dated April 1.

4/ The term "unemployed" is defined in the Unemployment Compensation Act as follows:

> An individual shall be deemed 'unemployed' with respect to any week during which he performs no services and with respect to which no earnings are payable to him....Section 1(e) of the Unemployment Compensation Act; D.C. Code 1981, sec. 46-101(e).

On April 18, 1980, an amended determination was made by a DOES Claims Examiner indicating that the reason for the overpayment was unreported earnings. This document was mailed to claimant, and claimant made written response on April 23 and April 28.

On April 29, 1980 imposition of a disqualification pursuant to Section 19(e) of the Unemployment Compensation Act was considered by a DOES Claims Examiner. The April 1 correspondence from the employer was reviewed as well as the written communications from the claimant. The Claim Record Card was annotated by the Claims Examiner as follows:

> After carefully considering the facts as stated, the claimant is given the benefit of the

> doubt because this examiner cannot fathom the motive of a person knowlegeable of laws to not only jeopardize his employment and profession but his future as a lawyer to obtain an extra $181.00 per week, illegally, when his annual average income is presently over $40,000.00. Decision on fraud: Section 19(e) of the Act is not imposed.

The employer appealed the decision not to impose the Section 19(e) disqualification. The claimant appealed the determination that he was overpaid.[5/]

5/ This issue was waived by the claimant prior to the final decision and is not before this Court.

Hearings were held by a DOES Hearing Examiner on both appeals on July 16, October 19, November 18, and December 2, 1980. The Hearing Examiner issued a decision on February 20, 1981 affirming the prior determination and stating, inter alia:

> While some of the claimant's oral and written evidence (including his hearing demeanor and credibility) raises substantial questions of his innocent "subjective understanding" of the statutory language, he is given the benefit of the doubt....

Both parties timely appealed the decision of the Hearing Examiner to the Acting Director of DOES. On June 18, 1981,

after careful review of the entire record, the Acting Director of DOES issued proposed findings and decision affirming in part (on the overpayment issue) and reversing in part (on the fraud issue). Claimant filed written objections to the proposed findings.

On July 7, 1981, the Acting Director issued the final decision of DOES. He upheld the Hearing Examiner on the finding of an overpayment and reversed the Hearing Examiner on the issue of fraud. Claimant was disqualified from receiving benefits through December 26, 1981.[6/]

6/ See footnote 1 at pages 2-3 above which quotes the applicable law.

On July 22, 1981, claimant timely filed a Petition for Review of the final agency decision with the District of Columbia Court of Appeals. After briefing and oral argument, the record was remanded to determine whether DOES had reasonably and adequately complied with claimant's requests for access to the administrative record.

On remand, claimant voluntarily absented himself from the hearing at which evidence was taken. After taking evidence, a DOES Hearing Examiner made findings which were certified to the District of Columbia Court of Appeals.

Thereafter, on August 5, 1982 the District of Columbia Court of Appeals affirmed the Acting Director's final

decision imposing a disqualification for fraud. Rodriguez v. District of Columbia, Dept. of Employment Services, D.C. App., 452 A.2d 1170 (1982). (The slip opinion is attached as an Appendix.) The District of Columbia Court of Appeals held:

(a) That there is substantial evidence in the record to support the final agency action;

(b) That claimant's "... explanation...[of how the misrepresentation occurred] reasonably could have been found unconvincing in light of the complete lack of evidence..." to support it;

(c) That claimant's argument regarding the jurisdiction of the agency to adjudicate unemployment

compensation claims is unpersuasive; and

(d) That claimant's Fifth Amendment due process arguments regarding the agency proceedings are unpersuasive.

It is from these holdings below that Isidoro Rodriguez now asserts the right to appeal pursuant to 28 U.S.C. Section 1257(1).

ARGUMENT

I. THIS APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION

Appellant challenges a ruling of the District of Columbia Court of Appeals affirming an order by the Acting Director of the District of Columbia Department of Employment Services (DOES) disqualifying appellant from receiving unemployment compensation benefits on the grounds that Appellant fraudulently misrepresented that he was unemployed when, in fact, he was employed; that is, he had earnings payable for services performed.

Appellant asserts that the ruling of the District of Columbia Court of Appeals condones a number of actions which are allegedly inconsistent with the

District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 744 (1973), (hereinafter the "Self-Government Act"); codified at various sections of the D.C. Code 1981, but principally at sec. 1-201 et seq. The Self-Government Act is the statute by which Congress established the present form of government for the District of Columbia and delegated to it the authority to govern its local affairs. Appellant asserts that the District of Columbia Court of Appeals has rendered a decision against the validity of a statute of the United States and that he has a right to appeal to this Court under 28 U.S.C. Section 1257(1). There is no merit to these assertions.

Appellant's argument rests on two premises: that the Self-Government Act is a "statute of the United States" for purposes of Section 1257(1); and that the Court below, by giving effect to conduct allegedly in violation of the Self-Government Act has rendered a "decision against its validity" within the meaning of that provision. Neither premise is well founded.

As appellant recongnizes (Jur. Statement at 42-43), Key v. Doyle, 434 U.S. 59 (1977), governs the first of these contentions. It holds that "no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application." 434 U.S. 59 at 68 (footnote omitted). As its very title suggests,

the District of Columbia Self-Government and Governmental Reorganization Act applies exclusively to the District of Columbia.[7/] Therefore, it is clear that the Self-Government Act is not a "statute of the United States" within the meaning of Section 1257(1).

However, even if the Self-Government Act were such a statute, there has been no "decision against its validity" under Section 1257(1). Appellant asserts that various actions by District of Columbia officials were inconsistent

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7/ Futhermore, there is no question that because the Self-Government Act is exclusively concerned with the establishment of local government and the definition of its authority, it is "[un]like most Congressional enactments" and more nearly "equivalent to [laws, such as municipal charters] enacted by state and local governments...." 434 U.S. 59 at 68, n. 14.

with provisions of the Self-Government Act, and that the administrative authority that decided this case (the Acting Director of DOES) was given such authority by a reorganization which was purportedly inconsistent with the Self-Government Act. He argues that "if their acts of noncompliance are allowed to stand, they would invalidate the [Self-Government] Act." (Jur. Statement at 42; see also Id. at 48). However, it has long been settled that

> "the validity of a statute", as these words are used in this act of Congress refers to the power of Congress to pass the particular statute at all, and not to mere judicial construction...."

Baltimore and Potomac R.R. Co. v. Hopkins, 130 U.S. 210, 226 (1889).

The District of Columbia Court of Appeals certainly did not challenge the authority of the Congress to enact the Self-Government Act. At most, it construed the Self-Government Act to the effect that it does not prohibit the conduct which appellant asserts contravenes that statute.[8/]

8/ The only conduct challenged by Appellant as violative of the Self-Government Act that the Distict of Columbia Court Appeals had to rule upon was the reorganization by which the authority to decide unemployment cases was transfered to the Director, DOES. The other conduct he challenged, such as the validity of the employment form used in connection with hiring him, was simply irrelevant to the Acting Director's decision. The Court below ignored all these contentions and reached only the jurisdictional issue.

Therefore, there was no decision against the validity of the Self-Government Act withing the meaning of section 1257(1) in this case. See, e.g. Ivanhoe Irrigation District v. McCracken, 357 U.S. 275 at 289-90 (1958) (construing federal statute so as not to affect relevant state laws is only a construction of federal law and not an invalidation thereof).

There has been no decision against the validity of a statute of the United States. Therefore, there is no basis for an appeal under Section 1257(1). Accordingly, Appellant's appeal under 28 U.S.C. Section 1257(1) must be dismissed for lack of jurisdiction.

II. NO WRIT OF CERTIORARI SHOULD BE GRANTED

Appellant suggests that if the Court decides it must dismiss his appeal, the Court should grant a writ of certiorari to review the decision below (Jur. Statement at 49). However, this case does not warrant the exercise of this Court's discretionary jurisdiction. The Court has made it clear that it will not review the decisions of the District of Columbia Courts on local matters, absent egregious error. Pernell v. Southall Realty, 416 U.S. 363 at 366 and 368-69 (1974); 28 U.S.C. 1257(3).

Final administrative action on an unemployment compensation claim is clearly a matter of only local concern.[9/] This fact was recognized in the development of the Self-Government

9/ See: Report of the Commission on the Organization of the Government of the District of Columbia, House Document No. 92-317, 92nd Cong. 2nd Sess. (1972) (Nelsen Report) Vol. II at 284-287. Unemployment Compensation "programs and activities are normally state and local functions". They "are predominantly for the benefit of District citizens [and] should be an integral part of the District Government...." Id. at 285. "They share the objectives of improving and protecting the status of the worker...." Id. at 286. Administration should be merged with other manpower and labor functions which are "local in nature." Id. at 287.

Act. Thus, Representatives Adams, Chairman of the subcommittee which reported the bill, stated:

"...[T]his is a recommendation of the Nelsen Commission. *** It is simply to transfer...an amalgamation of programs, such as unemployment compensation..., which are generally, throughout the United States, run by the State, the county or the city government [from the federal Government to the Government of the District of Columbia]."[10/]

10/ Reprinted in Home Rule For The District of Columbia 1973-1974: Background and Legislative History of H.R. 9056, H.R. 9682, and Government Reorganization Act, House Committee Print, 93rd Cong., 2nd Ses. (1974) (hereinafter "Home Rule History") at page 104.

There has been no egregious error in the decision below. (See Argument III below.) There is certainly no problem of general federal law of nationwide application in this case.[11/] Furthermore, there is no constitutional issue properly before the Court in this case.

As reflected by the decision below and despite Appellant's continuous attempts to inject other issues into this case, the major question before the Court below was whether the agency properly found that Appellant had knowingly misrepresented a material fact in order to obtain unemployment insurance benefits to which he was not entitled.

11/ The Self-Government Act is a law "exclusively applicable to the District of Columbia" both because it affects local matters exclusively, and because it serves local purposes.

Nevertheless, appellant asserts that his Fifth Amendment right to due process of the law was denied by the administrative process within DOES and within the District of Columbia Court of Appeals. He asserts that his First Amendment rights to freedom of speech and to petition the Congress have been violated. He appears to assert that the Self-Government Act is unconstitutional *if* it is not "a statute of the United States" for purposes of appeal under 28 U.S.C. Section 1257(1) (Jur. Statement at viii). He also charges that the Council of the District of Columbia passed *ex post facto* laws merely to deprive him of his rights. (Jur. Statement at vi and 50).

These constitutional claims are clearly frivolous. The Fifth Amendment argument was found by the District of Columbia Court of Appeals to be "unpersuasive". Indeed the extensive transcript in this case of hearings that extended over a five-month period shows that Appellant was accorded procedural and substantive due process of law.[12/]

The First Amendment argument is raised (Jur. Statement at 50-51) for the first time in this Court and assumes the existence and truthfulness

12/ Record at Tab V.

of facts not in the record on this unemployment compensation claim. See Jur. Statement at vi; 4-5; 9 (par. 2); 11 (par. 2); 14-15; 24 (par. 3) - 25; and 32 (par. 2). Appellant cannot, of course, now raise issues he did not raise below. See e.g., United States v. Ortiz, 422 U.S. 981 at 988 (1975); Matheson v. Branch Bank of State of Alabama, 48 U.S. (7 How.) 260 at 261 (1849). Futhermore, the record is clear that Appellant has fully exercised his First Amendment rights throughout the administrative and judicial review process below.

The assertion that if the Self-Government Act is not a "statute of the United States", then Congress has made an unconstitutional delegation of its legislative authority is specious and has never been raised below. The same is true of the ex post facto law charge.

Moreover,some of the issues that Appellant asserts makes this case of more than local importance are irrelevant to a decision on the matter in question (namely, whether he was properly disqualified from receiving unemployment benefits because of his material misrepresentations in securing them).

Appellant asserts that there were a variety of actions taken in connection with his being hired by the D.C. Office of Employee Appeals (OEA) which were inconsistent with the Self-Government Act. Thus, he asserts that the use by the employer of personnel forms and procedures different from those used by the federal government violated the Self-Government Act; that he was hired for a position in an office for which funds had not been authorized by Congress; and that this also violated the Self-Government Act (See Jur. Statement, pp. 47-48).

Even if these assertions are correct, however, they are simply irrelevant to the issue in this case which is whether appellant knowingly misrepresented that he was unemployed

when he was performing services, had earnings payable, and was also receiving unemployment benefits. The question of whether he had been properly hired is simply irrelevant to that determination. Therefore, issues relating to the hiring of Appellant by OEA are not presented here.

The sole issue involving the Self-Government Act which is relevant to the decision below is whether the Acting Director of DOES had jurisdiction to take the final agency action or whether he lacked jurisdiction because the reorganization vesting that authority in him contravened the Self-Government Act. The District of Columbia Court of Appeals found

no merit to the latter contention. See 452 A. 2d 1170 at 1173. As is shown in Argument III below, that decision is clearly correct. Accordingly, there are no issues properly presented in this case which warrant the Court's grant of a writ of certiorari.

III. THE FINAL JUDGMENT OF THE DISTICT OF COLUMBIA COURT OF APPEALS IS CLEARLY CORRECT AND SHOULD BE AFFIRMED

As indicated above, only two issues of significance were decided below. These are 1) whether the Acting Director of DOES had the authority to take the final agency action, and 2) whether the action was supported by substantial evidence and in accordance with applicable law. The Court below unquestionably decided both of these issue, correctly.

A. The Acting Director Had Jurisdiction To Render The Final Agency Decision

Section 422(12) of the Self-Government Act (D.C. Code 1981, sec. 1-243(12)) authorizes the Mayor to reorganize "offices, agencies, and other entities within the

executive branch ***." In the Court below, Appellant conceded that the District Unemployment Compensation Board (DUCB) was in the executive branch of the District government at least until 1978.[14/] By Reorganization

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14/ Appellate brief to the District of Columbia Court of Appeals dated October 8, 1981 (D.C. App. Br.) at p. 32. Appellant there argued that certain Council action subsequent to the reorganization transferring the functions of the District Unemployment Compensation Board to the Director, District of Columbia Department of Labor "took it [the Board] out of the Executive Branch and made it an independent agency ***." In response to Appellant's argument concerning the effect of this subsequent Council action, DOES relied on a memorandum of the then Acting Corporation Counsel of the District of Columbia (attached as an appendix to Respondent's Brief filed with the District of Columbia Court of Appeals on January 26, 1981) showing that while the Council reconstituted the Board for the purposes of issuing regulations, it did not retransfer to the new Board any other authority.

Plan No. 1 of 1978, the Mayor, with the concurrence of the Council of the District of Columbia, abolished the DUCB and transferred its functions to the Director of the newly-established District of Columbia Department of Labor, predecessor to the current Department of Employment Services (DOES). See 25 D.C. Register 2889 (September 29, 1978).

Appellant's argument below (D.C. App. Br., pp. 29-31), which he is apparently reasserting in this Court (Jur. Statement at pp. 44-45) is that the power to reorganize does not include the power to abolish an executive agency.[15/]

15/ In the Self-Government Act, Congress made specific provisions for those agencies it wished to be "independent agencies" and the District Unemployment Compensation Board was not among them. See Sections 491-495 of the Self-Government Act.

However, in enacting the Self-Government Act, Congress made it clear that the Mayor's authority to reorganize included the power to abolish an executive agency. See the remarks of Representative Diggs, principal spokesman for the House-Senate Conference Committee on the Self-Government Act, explaining the Conference Report, 119 Cong. Rec.___ (December 17, 1973), reprinted at Home Rule History, supra, p. 3055 ("the Mayor *** is vested with basic executive authority, including the following: *** establishing, reorganizing and abolishing agencies subject to Council approval ***")(emphasis supplied) Cf. also 5 U.S.C. Section 902(2)(1976) ("'[R]eorganization' means a transfer, consolidation, coordination, authorization, or abolition ***") (emphasis supplied).

There is, therefore, no doubt concerning the Mayor's authority under the Self-Government Act to effect the reorganization which resulted in the Acting Director's jurisdiction in this case.

B. The Proper Standard Of Review Was Used Below To AFfirm The Final Administrative Action.

The standard of judicial review of final agency administrative action is to determine whether the findings are supported by substantial evidence in the record and are otherwise in accordance with applicable law. This Court has defined substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion...." Consolidated Edision v. N.L.R.B., 305 U.S. 197 at 229 (1938); accord., Washington Post Company v. District Unemployment Compensation Board, D.C. App., 377 A.2d 436 at 439 (1977).

Furthermore, findings of fact which are supported by substantial evidence are conclusive regardless of whether a reviewing Court might have reached a different conclusion. Section 11(f) of the District of Columbia Unemployment Compensation Act; D.C. Code 1981, sec. 46-112(f). See District of Columbia Administrative Procedure Act, D.C. Code 1981, sec. 1-1509 and sec. 1-1510.

The Court below applied the proper legal standard and found that there was substantial evidence to support the final agency action. See Appendix for the decision below. It sets forth in great detail the substantial evidence in the record from which the Acting Director of DOES reasonably concluded

that claimant knowingly made false statements concerning his employment status.

The Unemployment Compensation Act places a duty upon DOES to properly disburse funds and to recover erroneous payments. This duty is that of a fiduciary, because employers' funds are held in trust for the prompt payment of benefits when due. This implies the duty not to pay if benefits are not due. See section 303(a)(1) of the Social Security Act, 42 U.S.C. sec. 503(a)(1). California Dept. of Human Resources v. Java, 402 U.S. 121 (1971).

Erroneous payments were made to claimant, a fact which he has conceded. by repaying $1,267 and by waiving the issue prior to the final administrative decision. The error was caused, because claimant while collecting unemployment benefits was also performing services for which he had earnings payable, e.g. he was not unemployed pursuant to the Unemployment Compensation Act.[16/]

The crucial issue before DOES and the District of Columbia Court of Appeals was whether claimant knowingly misrepresented these material facts. Both found substantial evidence to support such conclusion. There has been

16/ The definition of the term "unemployed" is found in section 1(e) of the Unemployment Compensation Act; D.C. Code 1981, sec. 46-101(e). Dyer v. District Unemployment Compensation Board, D.C. App., 392 A.2d 1 at 3 (1978). See footnote 4 above at page 7 which quotes the applicable law.

no error, egregious or otherwise, in the decision below. Appellant has not set forth any legal reasoning in support of his proposition that the Court below erred. Therefore, the decision below is clearly correct and should be affirmed.

CONCLUSION

For the reasons more fully stated above, the appeal in No. 82-1098 should be dismissed and no writ of certiorari should be granted; or the decision below should be affirmed.

GRACE LOCKETT ROSNER
General Counsel, DOES
Counsel of Record
for Respondent

CERTIFICATE OF SERVICE

This is certify that I have mailed, postage prepaid, three copies of the foregoing Motion to Dismiss or to Affirm with Supporting Brief by certified mail, return receipt requested, on this 11th day of February, 1983 to Appellant as follows:

Isidoro Rodriguez
604 South View Terrace
Alexandria, VA 22314

Grace L. Rosner
Grace Lockett Rosner

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 81-900

ISIDORO RODRIGUEZ, PETITIONER,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES, RESPONDENT.

Petition for Review of Decision of the
District of Columbia Department
of Employment Services

(Argued March 10, 1982 Decided August 5, 1982) *

Isidoro Rodriguez *pro se.*

Grace Lockett Rosner for respondent.

Before FERREN, PRYOR, and BELSON, *Associate Judges.*

PER CURIAM: Petitioner seeks review of a Final Decision of the Acting Director of the District of Columbia Department of Employment Services (the Department) ordering that petitioner be disqualified from receiving unemployment compensation benefits for a period of two years on the ground that petitioner committed fraud in

* The original disposition of this case was by an unpublished Memorandum Opinion and Judgment. Respondent's motion requesting publication was granted by the court.

representing his employment status to the Department.[1] We affirm.

In his petition for review, petitioner alleged that his request to the Department for record material necessary to prepare his appeal of the Appeals Examiner's decision to the Acting Director was not complied with by the agency in accordance with D.C. Code 1981, § 1-1509(c).[2] We found that the record before us was insufficient to permit a determination whether the Department had complied with petitioner's request. Accordingly, we ordered the record remanded to the Department in order that evidence might be taken and a finding made as to whether the Department had "reasonably and adequately" complied with petitioner's request for record material.[3]

Pursuant to our order, the Department took evidence, including the sworn testimony of Department employees, that petitioner's requests for record material had been complied with in accordance with the provisions of § 1-1509(c). Petitioner offered no evidence in support of his contention that he had been denied the material, and voluntarily absented himself from the hearing at which testimony was taken.

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[1] The Acting Director's Final Decision also affirmed the Appeals Examiner's finding that petitioner had been overpaid by the Department in that he received benefits while employed. Although petitioner seeks review of the Acting Director's determinations with respect to both overpayment and fraud, the record indicates that petitioner conceded overpayment in a hearing before the agency. We consider therefore that the overpayment issue is not before us.

[2] D.C. Code 1981, § 1-1509(c), provides that the agency shall maintain an official record in each contested case. Record material must be made available to parties to the case upon request. *See Quick v. Department of Motor Vehicles*, D.C. App., 331 A.2d 319 (1975).

[3] Order dated March 10, 1982.

The Acting Director's finding, issued pursuant to this court's order, was that petitioner's request for record material was reasonably and adequately complied with. We conclude that the record evidence supports the Acting Director's finding on this issue. We further conclude that there is substantial record evidence to support a finding that petitioner committed fraud upon the Department, and affirm the disqualification imposed by the Acting Director pursuant to D.C. Code 1981, § 46-120(e).[4]

Petitioner is an attorney who specializes in personnel and unemployment compensation law. He was employed by the District of Columbia Government, Office of Personnel, as an "Expert Consultant/Legal Counsel" from April, 1979 to December, 1979. On January 7, 1980, petitioner filed for unemployment compensation benefits. He claimed benefits for the calendar week ending February 9 through the week ending March 22, 1980, and benefits were paid to him for all seven weeks. In accordance with Department regulations, petitioner certified that he was not employed during each of the weeks for which he claimed benefits.

On February 4, 1980, petitioner began performing services for the Office of Employee Appeals. On that date the Office was in an organizational stage and funding for it had not been approved. The Chairperson of the Office of Employee Appeals testified in hearings before the Department that petitioner started working for that office

[4] D.C. Code 1981, § 46-120(e) provides:

> Any person who the Board finds has made a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this chapter may be disqualified for benefits for all or part of the remainder of such benefit year and for a period of not more than 1 year commencing with the end of such benefit year. . . .

as a volunteer and that petitioner did not know "for some time" if or when he would get on the payroll.

On February 20, 1980, petitioner signed a notarized appointment affidavit on which the date of his appointment to a position with the Office of Employee Appeals was designated as February 4, 1980. The record is not clear as to when petitioner first received payment for his services, but it was not later than March 18, 1980, as petitioner has conceded that as of that date he received a check with a notification that he was being paid as an employee of the Office of Employee Appeals.

In accordance with Department procedure, petitioner's employer, the District of Columbia Office of Personnel, was notified that petitioner was claiming benefits. On April 1, 1980, a memorandum was addressed to the Department by the employer requesting a review of petitioner's eligibility for benefits and seeking the imposition of a disqualification for fraud. On the same date, petitioner informed the Department of a possible overpayment and submitted a check in the amount of $1,000 to be applied thereon pending determination of overpayment by the Department.

A Claims Deputy found that there had been overpayment in the amount of $1,267 in that petitioner received benefits while employed. The Deputy declined to impose a disqualification for fraud pursuant to § 46-120(e) after concluding that petitioner did not misrepresent willfully his employment status while claiming benefits. The Claims Deputy based his conclusion in part on his own belief that "a person knowledgeable of the laws [would not] jeopardize [not only] his employment and profession but his future as a lawyer to obtain an extra $181 per week illegally, when his annual average income is presently over $40,000."

Petitioner appealed the determination of overpayment and the District of Columbia appealed the determination of no disqualification for fraud. Hearings were held before the Appeals Examiner between July and December, 1980. On February 20, 1981, the Appeals Examiner issued his decision that the prior determinations of overpayment and no fraud be affirmed. The Appeals Examiner indicated his reliance upon the opinion of the Claims Deputy with respect to the fraud issue. Petitioner and the District of Columbia appealed the Appeals Examiner's decision to the Acting Director of the Department. On July 17, 1981, the Acting Director issued a Final Decision affirming the Appeals Examiner on the issue of overpayment but reversing on the issue of fraud. The Acting Director concluded that application of the subjective test set forth in *Jacobs v. District Unemployment Compensation Board*, D.C.App., 382 A.2d 282 (1978) to the facts of the instant case compelled a determination that petitioner knowingly misrepresented his employment status and committed fraud upon the Department. We sustain that conclusion.

We have held that the elements of a § 46-120(e) violation essentially track the common law requirements for proof of fraud, those elements being, false representation of a material fact or failure to disclose a material fact, knowledge of the falsity, intention to induce reliance upon the misrepresentation, and actual reliance. *Id.* at 286. Whether a claimant has knowledge of the falsity at issue is to be determined by reference to a subjective standard, *i.e.*, the state of mind of the claimant rather than that of a reasonable person in the position of the claimant is to be considered. *Id.* at 287. The Appeals Examiner's reference to the Claims Deputy's opinion concerning the motives of an individual in petitioner's position indicates that the Appeals Examiner incorrectly applied

a reasonable person test, rather than the subjective test mandated by *Jacobs*.

In addition, there is sufficient record evidence to sustain the Acting Director's finding that petitioner knowingly made false statements concerning his employment status. The Acting Director noted that appellant was an attorney experienced in personnel matters and familiar with all District of Columbia unemployment compensation procedures. In other words, he is presumed to be aware of the legal requirement in this jurisdiction that to be eligible for compensation under the District of Columbia Unemployment Compensation Act, an individual must not have performed any services or received any earnings during the period benefits are claimed. *Dyer v. District of Columbia Unemployment Compensation Board*, D.C. App., 392 A.2d 1, 3 (1978). He is also presumed to be aware of the statutory definition of "earnings" as all remuneration *payable* for personal services. *See* D.C. Code 1981 § 46-120(d).

Petitioner signed an appointment affidavit on February 20, 1980, indicating that his appointment was effective February 4, 1980. He thus was chargeable as of February 20, with knowledge that he was employed and had earnings due him beginning February 4, 1980. Moreover, at the latest by March 18, 1980, petitioner received a pay stub indicating he was being paid as an employee of the Office of Employee Appeals. The D.C. Payroll Register indicates that he was paid on that date for a period commencing February 24, 1980. A Certificate of Wage Earnings which accompanies payroll checks to D.C. government employees was issued for the pay period ending March 8, 1980. In the normal course, petitioner would have received the certificate on March 22, 1980. Nevertheless, on March 26, 1980, petitioner certified that he was un-

employed through the period ending March 22, 1980, and accepted benefits for that period.

Petitioner's explanation that he believed payments he received in March 1980, were in payment of a claim against his former employer, the Office of Personnel, reasonably could have been found unconvincing in light of the complete lack of evidence that petitioner was ever notified that the claim was settled or that he was receiving payment on that claim.

In addition to alleging that there is insufficient record evidence to support the Acting Director's finding of fraud, petitioner asserts that the Department is without jurisdiction to adjudicate unemployment compensation claims; that proceedings before the Department were not conducted in accordance with the due process requirements of the Fifth Amendment and the provisions of the District of Columbia Administrative Procedure Act, and that the Appeals Examiner was not impartial, but was subject to the control of unnamed "higher authorities." We find these arguments unpersuasive, and affirm the Final Decision of the Acting Director of the District of Columbia Department of Employment Services.

Affirmed.